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March 30, 2012

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VIA FACSIMILE

Chambers of Hon. Cathy Seibel
United States District Judge
The Hon. Charles L. Brieant Jr.
Federal Building and Courthouse
300 Quarropas Street
White Plains, New York 10601-4150

Re: *Schlenger v. IBM Corporation & Gary Lipson*
No. 09-CV-3986 (CS)

Your Honor:

We represent defendants International Business Machines Corporation ("IBM") and Gary Lipson in this matter. Defendants write in response to the letter to Your Honor from Plaintiff's counsel, Gail Auster, dated March 29, 2012, in which Plaintiff requests a pre-motion conference to seek permission to file a **fourth** amended complaint in this action.

The proposed fourth amended complaint would be the **fifth** complaint filed by Plaintiff, herself an experienced attorney, in this action – and the **third** filed by Plaintiff's present counsel since they were substituted as counsel on November 14, 2011. IBM has already successfully moved to dismiss Plaintiff's First Amended Complaint, and subsequently Plaintiff has filed two additional amended complaints. At the January 25, 2012 pre-motion conference regarding Defendants request to move to dismiss the then-operative Second Amended Complaint, Your Honor made clear that the time for Plaintiff to amend was before Defendants moved to dismiss. In fact, Your Honor told Plaintiff's counsel during that conference: "[I]f there is any amendment that you think you might want to make, let's do it now." (The relevant portion of the transcript from the January 25 conference is attached as Exhibit A.) Plaintiff did in fact amend the complaint, by filing the Third Amended Complaint on February 6, 2012. Defendants have already served their motion to dismiss the Third Amended Complaint on Plaintiff's counsel.

Plaintiff's request to file yet another complaint would do nothing more than further delay this action, and require Defendants to file *another* motion to dismiss. Plaintiff is represented by not one but two experienced attorneys, who have had multiple opportunities to plead Plaintiff's claims. At some point, Defendants are entitled to defend themselves against Plaintiff's allegations, rather than constantly having to address new complaints.

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IBM therefore respectfully requests that Your Honor deny Plaintiff's request to file a fifth complaint. Although Defendants do not believe it is necessary to waste the Court's time with a pre-motion conference on this matter, we are available for a conference at the Court's convenience.

Respectfully submitted,



Allan S. Bloom
of PAUL HASTINGS LLP

Attachment

cc: Lisa Ruth Lipman
Gail I. Auster
Attorneys for Plaintiff

EXHIBIT A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----X
SUSAN AMY SCHLENGER,

v.

09 CV. 3986 (CS)

METROPOLITAN LIFE INSURANCE COMPANY,
FIDELITY EMPLOYER SERVICES COMPANY,
LLC, IBM CORPORATION, et al.,

Defendants.

-----X
U.S. Courthouse
White Plains, N.Y.
January 25, 2012
2:30 p.m.Before: HON. CATHY SEIBEL,
United States District Judge

APPEARANCES

GAIL I. AUSTER, Esq.
LISA R. LIPMAN, Esq.
910 West End Avenue, Suite 1a
New York, N.Y. 10025
Attorneys for PlaintiffPAUL HASTINGS, LLP
BY: ALLAN S. BLOOM, Esq.
ERIN E. LARUFFA, Esq.
75 East 55th Street
New York, N.Y. 10022
Attorneys for IBMSue Ghorayeb, R.P.R., C.S.R.
Official Court Reporter

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1 THE CLERK: Schlenger against IBM.

2 THE COURT: Good afternoon everyone. Ms. Auster,

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9 also the case that sometimes what I say at the pre-motion
10 conference is -- doesn't change and a party wastes a lot of
11 time and money making a motion that isn't going to get them
12 anywhere. So, I throw out my comments by way of free advice,
13 which is worth what you pay for it.

14 If there is a motion to dismiss, I don't see a need
15 to hold up discovery, because I think the chances of my
16 dismissing everything are very, very slim. So, I can, I can
17 schedule a motion to dismiss and, Mr. Bloom and Ms. Laruffa,
18 you can, you can decide if you want to make the motion after
19 this very discouraging speech I just gave. And if your
20 client wants to go ahead, we will go ahead, but as I said, I
21 think we should do discovery at the same time.

22 Let me ask Ms. Lipman or Ms. Auster something.
23 Having seen what's in IBM's letter, is there any -- are there
24 any facts that you want to beef up in the Complaint?

25 What I don't want to do -- what I'm not going to do

Sue Ghorayeb, Official Court Reporter

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1 is, if there is a motion to dismiss, I don't want to do what
2 I did last time, which is grant it and then give you leave to
3 amend. So, if there is any amendment that you think you
4 might want to make, let's do it now. Is there?

5 MS. LIPMAN: Yes, Your Honor, very slightly.

6 Mr. Bloom did raise a question about the COBRA
7 claim, and I do think it's sufficiently pled, but as I said
8 in my letter to Your Honor, dated the 21st of December, we
9 didn't try to allege any COBRA or ERISA retaliation claim,
10 which is a Section 510 claim, but we didn't specify the
11 section of ERISA. So, I would amend it to clarify any facts

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12 in there and to cite the section of ERISA, and that would be
13 the only thing that I would see amending at this point. Your
14 Honor.

15 THE COURT: Okay. And how long would you like to
16 accomplish that?

17 MS. LIPMAN: Ten days.

18 THE COURT: All right. Today is the 25th. So,
19 February 6th is the Monday. So that will be a Third Amended
20 Complaint by February 6th.

21 And, Mr. Bloom, if you still want to make your
22 motion, when would you like to make it?

23 MR. BLOOM: Thank you, Your Honor. February 6th.
24 If at all possible, given the February break, I would ask
25 March 15th for us to file our motion.

Sue Ghorayeb, Official Court Reporter

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1 THE COURT: Yeah. I mean that's, that's fine with
2 me. I have so many dozens on line ahead of you that there's
3 no need to, for either side, to be macho here.

4 MR. BLOOM: May I just say, say two quick things,
5 Your Honor --

6 THE COURT: Yes.

7 MR. BLOOM: -- based on what Your Honor said
8 earlier, and I'll spare everyone my general responses.

9 I mean last time you discouraged us a lot from
10 making that first motion and I want you to know that I shared
11 your thoughts in great detail with IBM, who unfortunately has
12 a very sophisticated Legal Department and we went ahead
13 anyway. We will go ahead now --

14 THE COURT: A year later and you are still in the

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client name:	<i>Schlenger v. Fidelity Employer Servs. Co. LLC, et al.</i> No. 09-CV-3986 (CS)		17321.00053
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